

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

JASON M. SUMRALL, )  
vs. )  
Plaintiff, )  
TINKER AIR FORCE BASE, et al., )  
Defendants. )  
Case Number CIV-07-809-C

## **MEMORANDUM OPINION AND ORDER**

Plaintiff filed a complaint on July 23, 2007, seeking relief under both the Rehabilitation Act, 29 U.S.C. §§ 701 et seq., and the Americans with Disabilities Act, 42 U.S.C. §§ 2101 et seq. (Dkt. No. 1.) The Court issued an order on January 17, 2008, requiring that Plaintiff show cause why the suit should not be dismissed for failure to serve the Defendant. (Dkt. No. 9.) Plaintiff attempted service, then filed a motion for default judgment when Defendant did not respond to the complaint. (Dkt. Nos. 14, 15.) The Court found that Plaintiff did not properly serve Defendant, so the motion was denied. (Dkt. No. 16.) Because Plaintiff's allegations and requests for relief were unclear, the Court also requested that he file an amended complaint, which was done on June 6, 2008. Id. Defendants<sup>1</sup> then filed a motion to dismiss under Fed. R. Civ. P. 12(b)(5), alleging that Plaintiff failed to effect proper service under Fed. R. Civ. P. 4(c)(2) and 4(m). (Dkt. No. 21.)

<sup>1</sup> In his amended complaint, the Plaintiff dismissed Tinker Air Force Base as the sole defendant and added the United States and the Department of the Air Force.

Defendants argued in the alternative that the Court should dismiss the present suit with prejudice under Fed. R. Civ. P. 41(b). Id. Plaintiff responded, requesting one last chance to attempt proper service. (Dkt. No. 22.)<sup>2</sup> On September 17, 2008, the Court denied the motion to dismiss and ordered Plaintiff to obtain proper service by October 17, 2008. Defendants have filed the present motion noting that although Plaintiff has properly served the United States Attorney for the Western District of Oklahoma and the United States Attorney General, Plaintiff has not yet properly served the Secretary of the Air Force. As a result of this failure, Defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(5). Plaintiff filed a response arguing that he has properly served the Secretary of the Air Force. Attached to Plaintiff's response are copies of forms used by the United States Marshal when effecting service. Although a return of service has not been filed, the documents attached to Plaintiff's response demonstrate summons and a Complaint were sent by the U.S. Marshal via certified mail to the Secretary in September of 2008.

The Tenth Circuit has held that where a pro se Plaintiff provides the Marshal's service with proper information regarding service, he may rely on that entity and should not be penalized if it fails to act properly. Olsen v. Mapes, 333 F.3d 1199, 1204 (10th Cir. 2003). The Court's record establishes that Plaintiff requested issuance of a summons directed to the Secretary at the proper address and that the summons and Complaint were provided to the U.S. Marshal which attempted service by mail. Thus, Plaintiff has satisfied his obligations

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<sup>2</sup> The same day that the Plaintiff responded, he provided a new address for the Secretary of the Air Force to the United States Marshals and summons was then reissued for service.

under the rules and should not be penalized for a lapse on some other entity's part. Accordingly, Defendants' motion to dismiss will be denied.

Additionally, Plaintiff filed a motion requesting that the Court order Defendants to send copies of all documents filed in this case to Plaintiff by certified mail. Fed. R. Civ. P. 5(b) governs service of pleadings other than the Complaint. Under Rule 5(b)(2)(C), service may be made by mailing to the last known address. There is no requirement that the sender use certified mail. If Plaintiff's current address on file with the Court is incorrect, he must notify the Court of the change. See LCvR 5.4(a).

Accordingly, Defendants' Motion to Dismiss (Dkt. No. 27) is DENIED. Plaintiff's Motion for Order (Dkt. No. 30) is DENIED.

IT IS SO ORDERED this 17th day of February, 2009.



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ROBIN J. CAUTHRON  
United States District Judge